No. 99-24

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1999

ORANGE COUNTY DEPARTMENT OF PROBATION,

Petitioner,

v.

ROBERT WARNER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

RICHARD B. GOLDEN
Orange County Attorney
Attorney for Petitioner
and Counsel of Record
255-75 Main Street
Goshen, NY 10924
(914) 291-3150

Of Counsel

KATHLEEN A. MISHKIN

DRAKE, SOMMERS, LOEB, TARSHIS
& CATANIA, P.C.
One Corwin Court
P.O. Box 1479
Newburgh, New York 12550

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Reply Brief in Opposition

Orange County respectfully submits this reply brief in further support of its petition for certiorari. As demonstrated in its petition and herein, the Court should grant the petition so that several important issues may be fully examined and finally decided.

I. Warner Has Not Demonstrated That *Lee*, Rather Than *Lemon* Should Be Determinative Under The Circumstances

Warner has not fully addressed the issue which forms the basic premise underlying Orange County's petition. It is Orange County's position that the lower courts erred in applying *Lee v. Weisman*, 505 U.S. 577 (1992) ("*Lee*") to the exclusion of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and progeny ("*Lemon*" *or "Lemon Test*") to determine whether the Establishment Clause is offended if a municipality (through its probation department) recommends to a sentencing judge that a convicted recidivist substance abuser who seeks parole rather than incarceration participate as a condition of probation in an Alcoholics Anonymous program ("A.A."). It is clear from decisions rendered throughout the circuits that, if *Lemon*, rather than *Lee* is applied to the facts and circumstances, the result would be a finding of no Establishment Clause violation.

Contrary to Warner's assertions otherwise, courts have not under similar circumstances "uniformly" found an Establishment Clause violation. *See* Brief in Opposition at p. 8. A more correct statement -- and the premise of Orange County's petition -- is that those courts which have applied *Lee* have uniformly found an Establishment Clause violation, while courts which have applied *Lemon* have uniformly found no Establishment Clause violation.

The cases relied upon so heavily by Warner only emphasize the *Lee* and *Lemon* dichotomy.[1] For example, in *Griffin v. Coughlin*, 211 A.D.2d 187, 626 N.Y.S.2d 1011 (3d Dept. 1995), *reversed*, 88 N.Y.2d 674, 649 N.Y.S.2d 903, 673 N.E.2d 98 (1996), *cert. denied*, 519 U.S. 1054, 117 S.Ct. 681, 136 L.Ed.2d 607 (1997), the lower court had applied the *Lemon Test* to find that a prison program requiring participation in Narcotics Anonymous in order to be eligible for expanded family visitation privileges did not violate the Establishment Clause. Its decision was reversed because the appellate court rejected the *Lemon Test* and, instead, analyzed the Establishment Clause issue by focusing exclusively upon *Lee*.

Under the very same facts, two courts came to diametrically opposed conclusions depending upon whether they focused exclusively upon *Lee*, or *Lemon*. The historical importance of maintaining the separation of church and state, combined with a recognition of the importance of allowing for the appropriate accommodation of religion, or spirituality requires that such haphazard results not be tolerated.

Likewise, in *Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996), the appellate court (applying *Lee*) reversed the lower court's decision (which had applied *Lemon* and found no Establishment Clause violation). The court in *O'Connor v. California*, 855 F.Supp. 303 (C.D. Cal. 1994) -- applying *Lemon* -- found no

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[1]Warner cites *Arnold v. Tennessee Board of Parole*, 956 S.W.2d 478 (Tenn. 1997) for the proposition that attendance at A.A. may not be used to determine whether to grant or deny parole. Brief in Opposition at p. 8 n.4. But, the court never even reached any conclusion with respect to whether: 1) A.A. is "religious"; or 2) whether conditioning parole on attendance at A.A. constitutes an Establishment Clause violation. Rather, the court remanded the matter to determine these issues, along with whether any alternative secular treatment programs were available.

Establishment Clause violation in circumstances where probationers were offered A.A. as the principal program.

Most recently -- indeed, after this petition was filed -- the United States District Court for the Southern District of New York determined that the Establishment Clause was not offended because the State of New York provided funds to a privately run alcohol crisis center on State-owned property which, *inter alia*, "encourages clients to attend regularly-scheduled A.A. meetings and familiarize themselves with its religiously-imbued "Twelve Steps."' *DeStefano v. Miller* (96 Civ. 9124) (N.Y.L.J., September 16, 1999, p. 39).

Applying the *Lemon Test* to find no Establishment Clause violation, The Honorable Colleen McMahon confirmed that there is "nothing inherently unconstitutional about involving an organization with religious ties in a government-funded program addressing social concerns . . . . relying in particular on the fact that [participants] have ultimate control over their own presence at the facility and, hence, whether they are exposed to the religious activities. *Id. See also, Board of Ed. of Kiryas Joel Village School District v. Grumet et al.*, 512 U.S. 687 (1994) (Souter, J.) (there is ample room under the Establishment Clause for "benevolent neutrality" which permits religious exercise to exist without sponsorship and without interference).

These decisions underscore the importance of determining once and for all which test, *Lemon* or *Lee*, should apply in circumstances involving government interaction, however minimal, with private organizations offering self-help or rehabilitation programs which may have a spiritual component. It also underscores the misplaced emphasis on "coercion" in circumstances where a convicted substance abuser who seeks probation rather be than be incarcerated is required as a condition of probation to participate in an effective, inexpensive and widely available self-help program.

There is no question but that A.A. meetings, which are independently run and not affiliated with any religious sect or denomination, are widely accepted as a most effective means with which to combat the disease of alcoholism. See Petitioner's Brief at p. 12-13. Moreover, members are "anonymous" and are not required to pay any membership dues.[2] *Id.*

According to Warner, the "primary problem" with Orange County's argument [that application of the *Lemon Test* would result in a finding of no violation of the Establishment Clause] is that "it would guarantee the government's ability to circumvent the Establishment Clause in every challenge to state-endorsed religious indoctrination." Brief in Opposition at p. 11. But, this is exactly what the *Lemon Test* was designed to prevent by focusing upon whether: 1) the government action at issue has a secular purpose; 2) a principal or primary effect that neither advances nor inhibits religion; and 3) does not involve excessive governmental entanglement. *Lemon, supra*, 403 U.S. at 612-13.

While protecting society from Establishment Clause violations, the *Lemon Test* recognizes and attempts to accommodate the practical and historical role that religion, including atheism, plays in individual people's lives. Responding to various situations where there are no bright lines, this Court has continually refined the *Lemon Test.*

For example, the second factor has been modified to include an "endorsement" element, *i.e.*, whether the challenged action was intended to, or has the effect of endorsing religion. *See County of Allegheny v. American Civil Liberties Union*, 492

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[2] The fact that members are not required to pay to become or remain members is significant in terms of availability to prospective probationers. Warner, himself, complained to the sentencing judge who relieved him of the obligation to attend A.A. because he would be required to spend his own money for treatment at a private facility. (116a)

U.S. 573, 592-93 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring). In evaluating the "effect" of the government action, the court looks to the particular physical setting of the challenged action and applies an objective standard to determine how an average observer would perceive the government action. *Id.* The evaluation of the third prong (excessive entanglement) is an aspect of the inquiry into the second prong (effect of the government action). *See Agostini v. Felton*, 521 U.S. 203, 232 (1997).

Warner concedes that the first prong of the *Lemon Test* is not offended by recommending participation in A.A. as a condition of probation; he recognizes that the governmental act of recommending A.A. as a condition of probation has a secular purpose. Brief in Opposition at p. 17. It is clear that there is no "excessive entanglement" insofar as Orange County is not involved in any way in the funding or substance of the A.A. meetings, including which particular A.A. meetings an individual might choose to attend.[3]

However, Warner claims that analysis under the second prong of the *Lemon Test* requires a finding that the Establishment Clause has been violated. Warner claims that there is "no intellectually honest way to deny [the] fact" that recommending A.A. "makes it appear" that Orange County has approved a "new civic religion". Brief in Opposition at p.14. This argument goes too far.

In reaching this conclusion, Warner confuses the mere recommendation of Orange County with the conduct or substance of the A.A. meetings, themselves. Contrary to Warner's assertion, A.A. is not Orange County's "adjunct."

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[3] In arguing that the third prong of the *Lemon Test* is violated, Warner asserts that the governmental action is "unnecessary." Brief in Opposition at p. 18, n.22. But this is not the appropriate test.

Brief in Opposition at p. 14. The government action at issue in this case is not related in any way to the conduct or substance of A.A. meetings, but rather the mere recommendation to the sentencing judge that a recidivist substance abuser, rather than be incarcerated, be required to attend A.A. as a condition of probation. Thus, the question which must be resolved is: How would an average or reasonable person perceive such a recommendation?

The answer to this question is clear. An average person would perceive the recommendation by a probation department of A.A. attendance under the circumstances as an attempt to allow a convicted recidivist substance abuser to forego incarceration and continue to live in his community, while participating in a no-cost, effective and conveniently located self-help rehabilitation program on an anonymous basis. It must be underscored that Orange County merely recommends participation in A.A. as a condition of probation; it does not formally order it, or physically participate in or provide funds with respect to any of the individual A.A. meetings. Indeed, each probationer chooses the location of particular A.A. meetings -- each of which are run by individual members -- without any direction.

The primary problem with Warner's position [that *Lee*, rather than *Lemon*, is the correct test to apply] is that it is based solely upon the amorphous, yet absolute, concept of "coercion" as it relates to immature and impressionable school children. As such, it is inapplicable to mature adults, especially in the context of governmental administration of the criminal justice system. Yet, this forms the basis for Warner's claim: The Establishment Clause violation "is underscored by the threat of imprisonment [i.e., coercion] if Warner failed to attend [A.A.] at the direction of his probation officer." Opposition Brief at p. 15.

But, probation is a privilege not a right. A probationer is free to reject A.A., or any other rehabilitation program in favor of serving his sentence. *See Griffin v. Coughlin*, 88 N.Y.2d 674, 710, 649 N.Y.S.2d 903, 905, 673 N.E.2d 98, 120 (Bellacosa, J., dissenting), *cert. denied*, 519 U.S. 1054, 117 S.Ct. 681, 136 L.Ed.2d 607 (1997). Moreover, a probationer who objects to attendance of A.A. on religious grounds may raise a Free Exercise claim. *See* Petitioner's Brief at pp. 19-21.

II A *De Novo* Standard Of Review Should Apply To The "Constitutional Facts" Of This Case

Warner's claim that the issues of foreseeability, superseding cause, consent and waiver are questions of fact, which may not be overruled except under a "clearly erroneous" standard, is not supported by case law. The standard of review of "constitutional facts," such as a court's findings on each part of the *Lemon Test*, is somewhat ambiguous. For example, in *Lynch v. Donnelly, supra*, this Court suggested that either a clearly erroneous, or *de novo* standard of review might apply. However, in a subsequent decision, this Court expressly held that the clearly erroneous standard did not apply to appellate review of a finding of malice under the First Amendment. *See Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 508 (1984).

District Courts which have grappled with the issue have held that a *de novo* standard applies. *See e.g., Harris v. City of Zion*, 927 F.2d 1401, 1402 n.1 (7th Cir. 1989); *New Life Baptist Church Academy v. Town of East Longmeadow*, 885 F.2d 940, 941 (1st Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990); *Northwest Indian Cemetery Protective Association v. Peterson*, 795 F.2d 688, 691 n.3 (9th Cir. 1986), *reversed on other grounds*, 485 U.S. 439 (1988); *Bender v. Williamsport Area School District*, 741 F.2d 538, 542 n.3 (3rd Cir. 1984), *vacated for lack of standing*, 475 U.S. 534 (1986). The fact that the Second Circuit remanded the matter for further factual findings

does not change the *de novo* standard of review which this Court should apply.

The issues of foreseeability, superseding causes, consent/waiver and immunity are properly before the Court. With respect to foreseeability, Orange County has demonstrated that it was not foreseeable that a ten-year self-avowed atheist, who had upon the advice of counsel voluntarily attended four (4) or five (5) A.A. meetings (some of which were held in churches and each of which began and ended with a prayer), would not have voiced some objection at sentencing or on appeal.[4] Likewise it was not foreseeable that the sentencing judge would have adopted the "offensive" condition had Warner notified him that he was an atheist. The evidence presented below makes it clear that: 1) Sentencing judges do not always accept the recommendations of a probation department (32a); and 2) the specific sentencing judge would have altered the "offensive" condition had Warner made known his objections. (JA-15a, 80a)

Likewise, the issues of whether the judicial act of imposing the "offensive" condition constitutes a superseding cause which relieves Orange County of liability, or entitles it to some form of immunity, along with whether Warner either consented to or waived his right to object to the "offensive" condition of probation are properly before the Court. These issues are discussed at length in Orange County's petition and we will not burden the Court by repeating them here.

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[4] Warner admits that during his deposition and at trial that he made it known that he had previously attended A.A. meetings because his attorney had advised him that the sentencing judge would look more favorably upon him if he could demonstrate that he was attempting to resolve his problems with alcohol. (78a)

Conclusion

For all of the reasons stated, the Petition for Writ of Certiorari should be granted so that the important issues raised herein may be more fully briefed and finally decided.

Dated: Goshen, New York
October 8, 1999

Respectfully submitted,

RICHARD B. GOLDEN
Orange County Attorney
Attorney for Petitioner
and Counsel of Record
225-75 Main Street
Goshen, New York 10924

Of Counsel

KATHLEEN A. MISHKIN

Drake, Sommers, Loeb, Tarshis & Catania, P.C.
One Corwin Court
P. O. Box 1479
Newburgh, New York 12550